UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

WILBERT W. KELLY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-46-P-H***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeals presents the questions whether the commissioner's decisions concerning residual functional capacity and credibility are supported by substantial evidence. I recommend that the commissioner's decision be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520, *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff was insured for benefits only through March 31, 1981, Finding 1, Record at 17; that prior to that date he had an impairment or impairments that were severe but

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on February 25, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

which did not meet or medically equal any listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404 ("the Listings"), Findings 3-4, *id*. at 18; that the plaintiff's allegations regarding his limitations were not totally credible, Finding 5, *id*.; that from the alleged onset date (April 1, 1979) to the date last insured, the plaintiff had the residual functional capacity to lift and carry 20 pounds at a time or up to 10 pounds occasionally, *id.* at 14 & Finding 7, *id*. at 18; that he was unable to perform any of his past relevant work, Finding 8, *id*.; that given his age at the relevant time (younger individual between the ages of 18 and 44), education (high school or equivalent), lack of transferable skills and residual functional capacity to perform the full range of light work, application of Rule 202.20 found in Appendix 2 to Subpart P, 20 C.F.R. Part 404 ("the Grid") resulted in a finding that the plaintiff was not disabled at the relevant time, Findings 9-13, *id*.; and that the plaintiff accordingly was not under a disability as that term is defined in the Social Security Act at any time through his date last insured, Finding 14, *id*. The Appeals Council declined to review the decision, *id*. at 3-4, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process. At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987);

Goodermote, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual functional capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

A previous decision of an administrative law judge, dated October 23, 1998, found the plaintiff not to be disabled based on an application for SSD filed on May 31, 1996. Record at 47-52. A subsequent decision of a different administrative law judge, dated February 28, 1997, remanded the case for further consideration. *Id*. at 38-41. No record of the result of that remand appears in the administrative record. The current decision, which follows a hearing before a third administrative law judge, is based on an application filed on July 14, 1999, *id*. at 13, and an issue of *res judicata*, *id*. at 108-09, was apparently resolved in the plaintiff's favor, *id*. at 22-26.

The plaintiff first contends that an administrative law judge may not determine physical residual functional capacity in the absence of such a determination by a medical professional, which is what happened in this case. Plaintiff's Itemized Statement of Errors (Docket No. 9) at 4-5. He cites no authority in support of this assertion. While an administrative law judge is not qualified to interpret raw medical data, the absence of a medical evaluation of a claimant's physical residual functional capacity does not necessarily require remand. *Perez v. Secretary of Health & Human Servs.*, 958 F.2d 445, 446-47 (1st Cir. 1991).

If the record reflects only mild impairments and the claimant does not clarify "the particular respects in which these are alleged to prevent [him] from performing [his] past work," no expert's evaluation of residual functional capacity is necessary. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 4-5 (1st Cir. 1991). An administrative law judge may "render[] common sense judgments about functional capacity based on medical findings, as long as [he] does not overstep the bounds of a lay person's

competence and render a medical judgment." *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990). The only impairments cited by the plaintiff in this regard are "a problem with [his] left ankle and a problem with his back," and he identifies the respect in which these are alleged to have prevented him from performing his past relevant work before the date last insured by stating that either "could easily preclude the standing which is the hallmark of jobs at the light level." Statement of Errors at 5. The full range of light work requires standing or walking for a total of six hours in an eight-hour work day. Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 29. However, none of the entries in the medical record identified by the plaintiff in support of his position on this issue, Record at 151, 155 and 163, Statement of Errors at 5, can reasonably be interpreted to support a conclusion that the plaintiff could not stand or walk for a total of six hours in an eight-hour workday.[2] Residual functional capacity is determined at Step 4 of the sequential evaluation process, where the burden of proof rests with the claimant. *Santiago*, 944 F.2d at 5. In this case, the administrative law judge did not render a medical judgment when he implicitly concluded that the medical evidence was consistent with a residual functional capacity for light work.[3]

[2] The medical note at page 155 of the record does include the statement, "Cannot work because of back pain," but that note, made by a physician for the purpose of a mental health consultation, is more likely a record of the plaintiff's own statement than it is a record of the physician's medical conclusion.

[3] The plaintiff also contends that the administrative law judge was required to further develop the record by "obtaining the private hospital records if possible as well as any other relevant records . . . ." Statement of Errors at 11. There is no indication in the record that the plaintiff identified any such private hospital or the possibility that any other relevant records existed. At oral argument, in support of his position on the plaintiff's alleged mental impairment, counsel for the plaintiff identified the reference to a private hospital at page 116 of the record as the hospital to which the statement of errors refers. That entry refers to hospitalization in April "for dizziness with determination that the problem was due to tension and nervousness" and a "[p]rivate hospital report 10-79 indicated veteran gave history of headaches, nervous tremors and occasional dizziness, all attributable to his nervous condition." Counsel then referred the court to page 55 of the record, which lists as exhibits submitted in connection with an earlier application for benefits records from the Osteopathic Hospital of Maine for admissions, *inter alia*, in April and October 1979. That hospital was not a psychiatric hospital, so the existence of such records does not support the contention of counsel at oral argument that the plaintiff was hospitalized for psychiatric treatment before the date last insured.

The plaintiff next attacks the administrative law judge's conclusion that his mental impairment before the date last insured was not severe, Record at 15, contending that the failure to have his claim evaluated by a psychologist or psychiatrist and the failure to complete a psychiatric review technique form are errors each of which requires remand. Statement of Errors at 6-9. He asserts that these requirements arise from the following statement in one of his medical records: "Previously hospitalized 4-79 for dizziness with determination that the problem was due to tension and nervousness . . . . Diagnosis shown of alcohol dependence, polysubstance abuse, dependent personality disorder." *Id*. at 7. The administrative law judge's decision on this point was made at Step 2 of the sequential evaluation process. 20 C.F.R. § 404.1520(c). At this stage, the burden of proof is also on the plaintiff. *Yuckert*, 482 U.S. at 146 n.5. This is a *de minimis* burden. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). The plaintiff has the burden to establish that his mental impairment was severe as of the date last insured, not merely that his mental impairment had its roots prior to that date. *Deblois v. Secretary of Health & Human Servs.*, 686 F.2d 76, 69 (1st Cir. 1982); *Carneval v. Gardner*, 393 F.2d 889, 890 (2d Cir. 1968). Neither the definition of personality orders in the Diagnostic and Statistical Manual of the American Psychiatric Association nor Listing 12.08, cited by the plaintiff, Statement of Errors at 8, serves to establish that the plaintiff's dependent personality disorder was severe before March 31, 1981.

There is nothing in this note in the medical record to suggest that the dependent personality disorder significantly limited the plaintiff's mental ability to do basic work activities, which is the essence of a severe impairment. 20 C.F.R. §§ 404.1520a(a); 404.1520(c). Preparation of a psychiatric review technique form based on this single entry, assuming *arguendo* that such an analysis would be required by 20 C.F.R. § 404.1520a(a), would be an empty exercise in the absence of any evidence of symptoms, signs, or laboratory findings, which constitute the evidence to be evaluated through the use of the form, 20 C.F.R. §

404.1520a(b)(1). The plaintiff offered no testimony about any mental impairments prior to the date last insured. When asked "what kept you from working [prior to 1981]?" he replied "My back was the major thing, and my left leg." Record at 30. Similarly, there is no evidence upon which a medical expert, if consulted during the hearing, could base an opinion as to severity of the dependent personality disorder before March 31, 1981. The plaintiff is not entitled to remand on the basis of the failure to complete a psychiatric review technique form or to call a medical expert to testify about his possible mental impairment before the date last insured.

The plaintiff also contends that the administrative law judge erred by failing to consider the impact of "the mental health issues" in determining residual functional capacity. Statement of Errors at 9. The administrative law judge is required to consider the combined effect of all impairments to determine whether the claimant has "a medically severe combination of impairments" by 20 C.F.R. § 404.1523, the regulatory section cited by the plaintiff. Again, in the absence of any evidence that the dependent personality disorder mentioned in the 1979 medical record had any effect at all on the plaintiff's ability to do basic work activities, there can be no error in a failure to consider the impact of that condition.

The plaintiff's final argument deals with the administrative law judge's evaluation of his credibility, which he asserts lacks support. Statement of Errors at 12-16. He states that "[t]here is simply nothing in the record which suggests that Mr. Kelly's statements are not entirely credible." *Id*. at 15. The plaintiff's entire testimony about his impairments in or before 1981 follows.

> Q What's wrong with your left ankle?
> A I got it caught in the back — side plate and back plate of a loader in 1978, and spun it around in a circle and broke it right off.
>
> * * *
>
> Q Well, from 1981 or prior to 1981, what was your problem? What kept you from working?
> A Prior to 1981?

Q Yes
A My back was the major thing, and my left leg.
Q What was wrong with your back?
A I've had shooting pains in it from my back that went down my left leg and traveled to the knees, and the right, and then it finally —
Q Did you have surgery for that?
A — went all the way down to my ankles.
Q Did you have surgery for that?
A Yes. I've had surgery twice on my back, Your Honor.
A Do you remember when?
A Not the exact dates, no, Your Honor.
Q Was it before 1981 or after?
A I think one was before, and the other one was after.

Record at 30-31. None of this testimony, given at a hearing at which the plaintiff was represented by a non-attorney, *id*. at 22, 95, is necessarily inconsistent with the conclusion that the plaintiff had the residual functional capacity for light work before March 31, 1981.[4] Accordingly, the question whether the administrative law judge properly discounted the plaintiff's credibility appears to be irrelevant.

Even if credibility is a relevant issue in this case, the administrative law judge complied, Record at 16, with the requirement that he make specific findings as to the relevant evidence he considered in determining to disbelieve the claimant, *DaRosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986).

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum

[4] There is no suggestion in the administrative law judge's opinion that "he was crediting some of the [plaintiff's] statements and discrediting others," Statement of Errors at 12 n.7, so there was no need for him to specify which he was discrediting.

and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 3rd day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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